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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Revision of the Commission's Rules to Ensure) CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency)
Calling Systems)

To: Chief, Wireless Telecommunications Bureau

COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AIRTOUCH COMMUNICATIONS, INC.

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September 14, 1999

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SUMMARY

The Commission's E-911 cost recovery rules are appropriate and should be maintained. The rules give carriers and PSAPs incentive to work together to craft and advocate mutually beneficial Phase I cost recovery mechanisms before state legislatures, and to cooperate in Phase I deployment efforts. Eliminating the cost recovery requirement will undermine the significant progress carriers and PSAPs have made toward Phase I implementation.

The limited availability of Phase I services to consumers in some areas does not indicate that the Phase I cost recovery rules have failed; rather, it oversimplifies the E-911 implementation process. Legislative, contractual negotiation, and cooperative technical and administrative efforts are necessarily time consuming. Carriers and PSAPs have had a "learning curve" to overcome in Phase I implementation. A "bill and keep" approach would undermine necessary cooperative efforts and hinder the widespread deployment of Phase I service. Also, arguments such as those advocated in Washington State -- that carriers may be required to implement ANI without cost recovery -- should be rejected outright. Eliminating carrier cost recovery in favor of "bill and keep" does not eliminate funding needs, and will create uncertainty for PSAPs and carriers; it will also undermine Phase I efforts to date.

In the states that have met the E-911 prerequisites, AirTouch has made significant progress in Phase I implementation. Even in jurisdictions with decentralized cost recovery administrative plans, AirTouch has made significant progress in deploying Phase I service. Unnecessary delays have occurred in jurisdictions which have attempted to impose Phase I transmission technologies. In all cases, AirTouch has actively worked to implement Phase I solutions where requested.

The Commission should clarify that carriers, not PSAPs, may choose their own Phase I technology solution and vendor. The Commission appropriately concluded that carriers' desire for a systemwide solution for reasons of cost efficiency and effectiveness is reasonable. Deployment and testing have demonstrated that multiple solutions with multiple carriers are feasible. Concerns for "gold plating" are unfounded; carriers have incentive to implement cost-effective, reliable, systemwide solutions; concerns for carrier costs are generally resolved while negotiating and administering a cost recovery mechanism.

Finally, the Commission should facilitate collaboration between carriers and PSAPs by addressing antitrust and confidentiality concerns that have arisen. The Commission should address antitrust concerns to the extent possible through its authority over mobile service spectrum. The Commission should also clarify that "reasonable and lawful" cost recovery mechanisms do not require public disclosure of proprietary cost and technical data. This will expedite Phase I negotiations by facilitating nondisclosure agreements between carriers and state and local government entities.

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COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AirTouch Communications, Inc. ("AirTouch")¹ hereby files comments in response to the Wireless Telecommunications Bureau's Public Notice of August 16, 1999, seeking public comment on the Report of CTIA, PCIA, APCO, NENA, and NASNA (the "Report") advising the Commission on issues concerning the status of "Phase I" wireless enhanced 911 ("E-911") service.² AirTouch has been actively involved in Phase I deployment and has worked closely with state and local legislators and officials and vendors to comply with the Commission's E-911 Phase I requirements.

¹ Vodafone AirTouch Plc, the parent corporation of AirTouch, is a global wireless communications company with interests in domestic and foreign cellular, paging, personal communications services, satellite and other operations.

² See Public Notice, *Wireless Telecommunications Bureau Requests Comment on Wireless E911 Report Filed by CTIA, PCIA, APCO, NENA, and NASNA on August 9, 1999*, CC Docket No. 94-102, DA 99-1627 (WTB rel. Aug. 16, 1999) ("Public Notice"); *Public Notice, Commission Seeks to Facilitate Wireless E911 Implementation and Requests a Report*, CC Docket No. 94-102, FCC 99-132 (rel. June 9, 1999) ("June 9th Public Notice").

While the Report discusses certain problems that carriers and PSAPs have encountered in deploying Phase I service, AirTouch submits that, notwithstanding the difficulties that have arisen, the Commission's rules are largely working as intended. Therefore, and as discussed herein, while AirTouch urges the Commission to clarify certain matters, the E-911 cost recovery rules should generally be affirmed.

BACKGROUND/INTRODUCTION

The Commission states that “[i]mplementation of Phase I of our E911 rules has not occurred as anticipated by the timetable in the rules” and cites two issues in particular, cost recovery mechanisms and choice of Phase I transmission technologies as possibly “causing delays in E911 implementation.”³ The Commission initially sought comment from the parties to the initial Consensus Agreement on “additional information *that will help the Commission speed E911 implementation*”⁴ and has now invited public comment to “address the positions and issues presented in the report”⁵

The Commission determined at the outset of this proceeding that it needed to act “to ensure that, *over time*, mobile radio service users on the public switched telephone network have the same level of access to 911 emergency services as wireline callers.”⁶ Further, the need

³ June 9th Public Notice at 1.

⁴ *Id.* (emphasis added).

⁵ Public Notice at 2.

⁶ *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Notice of Proposed Rulemaking*, CC Docket No. 94-102, 9 FCC Rcd. 6170, 6176 (1994) (emphasis added).

for a cost recovery mechanism, due to the significant costs expected for E-911 implementation was acknowledged by all parties, including carriers and public safety organizations.⁷ The Commission's E-911 Phase I rules attempted to strike an appropriate balance in this area. The decision as to whether E-911 is to be implemented in a particular market was determined to ultimately be an issue for state and local governments to resolve by (1) upgrading the PSAP networks as necessary, and (2) implementing a cost recovery mechanism. Once these measures are implemented, carriers in turn are required to implement Phase I capabilities.

As AirTouch discusses herein, this regulatory "bargain" is appropriate and is working, albeit more slowly than the Commission anticipated. The legislative and contractual/administrative issues that have slowed the deployment of Phase I service are, in fact, being resolved, and the current cost recovery approach should be maintained to facilitate continued cooperation between carriers and PSAPs. The current rules provide for an equitable allocation of E-911 implementation costs and burdens and, importantly, give carriers and PSAPs incentive to work together to craft and advocate mutually beneficial cost recovery mechanisms before state legislatures.

While AirTouch supports Commission clarification of some aspects of its E-911 rules, eliminating the cost recovery requirement will eviscerate the progress that carriers and PSAPs have already made toward E-911 implementation. Further, such an outcome would in

⁷ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 94-102, 11 FCC Rcd. 18676, 18719-722 (1996) ("*E-911 First Report and Order*").

fact undermine the Commission's objective in this proceeding by delaying the widespread availability of E-911 services.

DISCUSSION

I. PHASE I IMPLEMENTATION IS PROGRESSING WHERE STATES HAVE MET THE E-911 COST RECOVERY AND PSAP CAPABILITY CONDITIONS

In the Public Notice initiating the Report, the Commission posits that "action with respect to two key implementation questions" -- cost recovery mechanisms and choice of Phase I transmission technologies -- "could expedite the pace of Phase I implementation" and that these issues "may be causing delays in E911 implementation."⁸ AirTouch respectfully submits that the limited availability of Phase I services to consumers in some areas, to date, does not warrant the conclusion that the Commission's Phase I rules have failed. Indeed, such a conclusion grossly oversimplifies the E-911 implementation process.

A. Phase I Implementation -- An Overview

As the Report explains, legislative efforts to derive a cost recovery mechanism often are time-consuming.⁹ Also, while the Commission premised its expectations for the timing of Phase I deployment in part on the assumption "that it is currently feasible to comply with the Phase I requirements based on the current wireline E911 network, *without incurring substantial*

⁸ June 9th Public Notice at 1. The Commission also asserts "that, in some cases, Phase I services are not being provided even where the two conditions in our E-911 rules would appear to be met to require implementation." *Id.* at 2. Obviously, the Commission should (and can) pursue enforcement actions where evidence demonstrates its requirements are not met.

⁹ Report at 4, 9.

*upgrades either to LEC networks or to PSAP equipment,”*¹⁰ as the Report indicates, there remain issues that must be resolved by LECs and PSAPs -- independent of actions undertaken by CMRS carriers -- for Phase I to be implemented more widely.¹¹ Moreover, independent of whether a cost recovery mechanism has been implemented, Phase I implementation requires negotiation and cooperation between CMRS providers and PSAPs over a variety of contractual, administrative and technical issues.

While implementation of carriers' E-911 capabilities is driven largely by Commission regulation and vendor availability, whether a PSAP implements these capabilities is governed and financed primarily by state and local legislative actions.¹² Thus, simply due to the parties involved in E-911 deployment, the process necessarily requires long-term political, technical, contractual and administrative cooperation between carriers and state and local government agencies. With this backdrop, AirTouch submits that the record submitted in response to the Report will reflect that considerable progress has been made in the essential (but less visible) contractual negotiation, legislative advocacy and other time-consuming administrative activities underlying Phase I implementation. These efforts have been constructive and Phase I implementation is now proceeding with greater efficiency and effectiveness throughout the country.

¹⁰ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order*, CC Docket No. 94-102, 12 FCC Rcd. at 22717 ¶ 107 (1997) (“*E-911 Reconsideration Order*”) (emphasis added).

¹¹ *See* Report at 15-16.

¹² *See id.* at 11 (“PSAPs often need money to prepare for wireless E9-1-1 Phase I implementation.”).

1. Deriving a Cost Recovery Mechanism Necessarily Requires Negotiation and Legislative Action

Deriving a reasonable cost recovery mechanism is necessarily a complicated process. It involves the transfer of sensitive technical and pricing data from carriers to state and local governments, and states have not always been able to ensure that such information will remain confidential. It also requires coordination between competing CMRS carriers and, in many instances, multiple state and local agencies. Thus, as indicated in the Report, simply the number of entities that may be parties to these negotiations inevitably complicates the development of cost recovery mechanisms and the resolution of technical and administrative issues.¹³ Additionally, given that carriers and PSAPs typically are drawing reimbursement from the same “pot” of revenues collected from E-911 surcharges collected from wireless subscribers, resolution of important accounting issues as to eligible carrier and PSAP reimbursement costs can be challenging. AirTouch’s experience is that, notwithstanding these difficulties, resolution of these matters is generally occurring over time.

Further complicating matters is that state legislative action is typically required to provide for both carrier and PSAP cost recovery.¹⁴ AirTouch has actively cooperated with local officials to advocate cost recovery mechanisms before state legislatures. This process alone takes time. Legislatures are, by design, deliberative bodies directly accountable to voters and where, as here, public funds are at issue legislative action can be difficult to accomplish. State legislators must balance funding for E-911 with other revenue and budgetary priorities and, in

¹³ *Id.* at 7-8.

¹⁴ *See id.* at 4.

numerous instances, state officials have affirmatively decided that Phase I implementation can wait.¹⁵ Moreover, many state legislatures are in session for only a limited period during the year. However, to the extent that relevant state or local legislative authorities have not enacted cost recovery mechanisms in a particular state or market, this is due *not* to the operation of the Commission's Phase I rules, or to the legitimacy of the cost recovery mechanism, but rather is due to the necessary complications of the legislative and contractual negotiation processes.

Eliminating carrier cost recovery, in favor of a "bill and keep" system as APCO proposes, does not eliminate PSAPs' public funding needs for E911 implementation purposes.¹⁶ Indeed, a bill and keep system could give some carriers a perverse incentive to *undermine* legislative efforts to provide funding mechanisms for PSAPs.¹⁷ In contrast, under the current rules, carriers have the incentive to cooperate with state and local officials and provide constructive input into the legislative process to help implement E-911 cost recovery mechanisms and deploy Phase I services.

¹⁵ In Hawaii, for example, cost recovery legislation was vetoed by the Governor. In Idaho, legislation was introduced, but carriers were unable to persuade legislators that the legislation should be enacted. Even where statewide legislation has not been enacted, however, AirTouch has cooperated with PSAPs when possible. In Arizona, for example, which has not adopted a statewide cost recovery mechanism, AirTouch and a PSAP in Pima County that was able to obtain Phase I funding have made significant progress toward Phase I implementation, including a successful effort to work around problems associated with operational changes in the underlying ILEC's network.

¹⁶ See APCO Statement at 4-5.

¹⁷ See *E-911 Report and Order*, 11 FCC Rcd. at 18721 (noting one party's contention that a cost recovery requirement "may provide [certain] cellular carriers the incentive they need to stop undermining attempts to obtain funding for 911 wireless service at the state and local level.").

As discussed herein, AirTouch's experience in a number of states, particularly Indiana and Oregon, demonstrates that the current rules *have* succeeded in this regard by keeping carriers, PSAPs and other state and local officials at the bargaining table. Indeed, even where state legislatures in AirTouch markets have not begun consideration of Phase I cost recovery mechanisms (such as in Kansas), AirTouch is separately working with local government associations to address the issue and jointly present constructive legislative proposals to the respective state legislatures. In sum, eliminating the cost recovery mechanism requirement will hinder -- not expedite -- E911 deployment and will create considerable uncertainty for PSAPs and carriers as to whether or to what extent E911 costs can be recovered. This outcome will disserve the public interest.

2. Phase I Implementation Also Necessarily Requires Resolution of Contracting and Administrative Matters to Implement Cost Recovery and Deploy Phase I Technology

To confirm, where states have implemented cost recovery mechanisms, there remain separate contracting and administrative matters that must be resolved between carriers, PSAPs and other state agencies in order for Phase I deployment to proceed. Further, some states, such as Colorado and Georgia, have left considerable discretion regarding cost recovery matters to local PSAPs. Contracting and administrative issues are particularly acute in those states because negotiations are required between every covered CMRS carrier and every PSAP over a broad variety of cost recovery matters. Not surprisingly, concerns have also arisen regarding the PSAPs' treatment of individual carriers' cost and pricing data. Nondisclosure agreements thus are often required, which necessarily adds to the timing of carriers' and PSAPs' discussions.

AirTouch's experience indicates that these difficulties are overcome through carrier-PSAP negotiation. Initial E-911 deployment efforts, including AirTouch's have been slower than hoped for a variety of reasons. There is invariably a "learning curve" for carriers and state and local agencies when dealing with technically complicated matters such as Phase I.¹⁸ Moreover, the actions necessary for such cooperation, ranging from substantive issues involving carriers' and PSAPs' efforts to educate one another regarding their respective networks' capabilities, to more mundane (yet essential) actions such as scheduling meetings, take time -- particularly when carriers must negotiate and coordinate with a number of individual PSAPs in any given state. Through this process, however, the parties come to recognize and resolve implementation issues, and to understand contractual issues that may arise. Over time, as technical issues are better understood and contractual issues involving accounting and administrative matters resolved, the Phase I implementation process speeds up significantly.

The Report highlights a number of measures underscoring how these collaborative efforts are providing Phase I deployment with some momentum. As the Report notes, NENA has developed materials and templates for the public safety community.¹⁹ There are numerous legislative models for E-911 cost recovery legislation.²⁰ AirTouch, moreover, has developed a model carrier-PSAP contract based on its own experience which, in many instances, has significantly simplified and expedited the negotiation process. Now, in fact, in some cases, the

¹⁸ See Report at 8-9.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 4; see discussion *infra* at Sections I-A.

negotiation period between PSAP and carrier has been reduced to a matter of days.²¹ Again, the negotiation process has built upon earlier efforts undertaken by carriers and PSAPs, and is now simpler, quicker, and better facilitating the deployment of Phase I.

Elimination of the cost recovery mechanism requirement does not eliminate the need for carriers and PSAPs to work out these technical and administrative matters. Indeed, a radical revision of the Commission's cost recovery rules would instead add considerable uncertainty to these negotiations. AirTouch submits that such uncertainty will slow down -- if not reverse -- progress that has already been made and would undermine the Commission's objective of expediting Phase I deployment.

B. Where States Have Met the E-911 Requirements, AirTouch Has Made Significant Progress in Phase I Implementation

While acknowledging in its separate statement to the Report that "some states may be able to act expeditiously and adopt reasonable and workable cost-recovery procedures," APCO asserts that "the requirement that there be a cost-recovery mechanism for carriers' costs has added substantial delay to wireless E9-1-1 deployment."²² APCO is arguing, in essence, that because it is too difficult for state agencies and PSAPs to comply with the cost recovery requirement, it should be eliminated. AirTouch's experience, however, is that carriers and the relevant state and local authorities have been able to resolve or are actively working to resolve the related issues of cost recovery implementation and technology choice.

²¹ See Attachment A.

²² APCO Statement at 3-4.

1. Phase I Implementation In Colorado and Georgia Demonstrates that the Commission's Rules Work Even When a State's Cost Recovery Mechanism Has Serious Inefficiencies

AirTouch provides cellular service in 19 states, many of which have made considerable progress toward widespread Phase I implementation and deployment. For example, AirTouch has made considerable progress in implementing Phase I in Colorado, turning up Phase I service in 9-10 counties, covering 75% of its service area in that state. Colorado's cost recovery mechanism, however, is not uniform and allows Colorado counties to collect surcharges *up to* \$0.70 per month per subscriber; today, surcharges vary from county to county, ranging from \$0.25 to \$0.70.

Colorado's cost recovery mechanism, which delegates considerable authority to local jurisdictions, imposes considerably more transactional costs and delays on carriers than states which have adopted a centralized cost recovery mechanism. Multiple carriers must negotiate with multiple PSAPs, as the terms of cost recovery in one county do not govern those in another. Thus, issues involving accounting and cost categories, once satisfactorily resolved in one county, may have to be negotiated "from scratch" in another. AirTouch has had similar experiences in Georgia, which also has no centralized system and allows PSAP authorities to collect surcharges of *up to* \$1.00.

Because of Colorado's and Georgia's fragmented cost recovery system, disputes over cost categories have slowed Phase I deployment in comparison to other states. In Colorado, moreover, some PSAPs have been reluctant to reimburse carrier costs. Even under these circumstances, however, which can be exasperating for both carriers and PSAPs, *Phase I has been and is being successfully deployed*. Again, *difficulty* in implementing cost recovery is not

tantamount to the failure of the Commission's cost recovery rules and such difficulties do not warrant eliminating the cost recovery requirement.

2. Oregon and Indiana Demonstrate that Phase I Implementation Will be Most Successful When Characterized by Cost Recovery, Liability and Centralized Administration

There are other states in which AirTouch has made significant progress toward Phase I implementation that have enacted effective cost recovery mechanisms. An example of such a state is Oregon, in which AirTouch anticipates initiating Phase I service within a few weeks. Since October 1995, CMRS subscribers in Oregon have paid a \$0.75 per month surcharge, equal to the surcharge paid by wireline customers, for purposes of 911 implementation. Oregon Emergency Management works with PSAPs statewide on E911 implementation matters, but administers the funds on a centralized basis. Oregon has also adopted liability protection for wireless 911 services akin to that provided for wireline carriers.

Oregon's program is noteworthy for a number of reasons. Oregon legislators several years ago affirmatively determined that E-911 deployment would be in their constituents' best interests, and enacted cost recovery mechanisms for that purpose. Moreover, Oregon has adopted a statewide, centralized mechanism for cost recovery and E-911 implementation, thus avoiding a balkanization of cost recovery mechanisms on a PSAP-by-PSAP basis. To date, it is largely contractual issues that have delayed AirTouch's Phase I implementation in Oregon, but these have largely now been resolved.

Indiana has also made significant progress toward Phase I implementation. Indiana has enacted a \$0.65 per month per subscriber E911 surcharge beginning May 1, 1998 — a minimum of \$0.25 of which amount is to be used for carrier reimbursement. Like Oregon,

Indiana has adopted a centralized system for the administration of cost recovery, and has established a Wireless Enhanced 911 Advisory Board for administration purposes. AirTouch has made significant progress in Indiana toward resolving contractual matters and continues to make necessary progress toward Phase I implementation.²³

3. State or PSAP Efforts to Impose Technology Choices on Carriers Hinders Phase I Deployment

In the *E-911 Report and Order*, the Commission agreed with concerns expressed by carriers, as well as state and local public safety organizations, that intrastate E-911 regulation may undermine “the achievement of various inseverable, nationwide aspects of E911 operations, including: (1) ubiquitous E911 operational compatibility; (2) the avoidance of state-by-state technical and operational requirements that would burden equipment manufacturers and carriers; and (3) the averting of confusion by end users, especially roamers, who are attempting to contact emergency service providers.”²⁴ The efforts by some PSAPs and state agencies to impose particular technology choices on carriers underscore the continued validity of this concern, which is particularly acute for large regional carriers like AirTouch.

²³ This is not to say that disagreements relating to cost recovery have not arisen in Indiana. Specifically, carriers generally believe that the \$0.25 per subscriber is insufficient to meet carriers’ costs, and disagree with that the Board’s interpretation of state law that carriers’ recovery is capped at \$0.31 per subscriber per month. These differences have not hindered the deployment of Phase I in Indiana, however, and carriers and the Board have continued to have constructive deliberations regarding cost recovery issues. *See* Indiana Wireless Enhanced 911 Advisory Board, Ex Parte Presentation in CC Docket No. 94-102, filed Sept. 1, 1999, at 4 (“Indiana’s cost recovery mechanism has to date worked as designed.”).

²⁴ 11 FCC Rcd. at 18730.

Phase I solutions are most reliable and cost-effective when implemented on a carrier-wide basis. Not surprisingly, then, AirTouch's experience is that Phase I is implemented most effectively when technology choice is left to carriers. Otherwise, carriers are subject to the possibility of an inefficient and costly patchwork of technologies; at a minimum, carrier-PSAP negotiations are delayed, with no corresponding public benefit.

In Minnesota, for example, the state's insistence on a particular technology delayed Phase I implementation for a considerable period of time. Due to concern for the cost of SS7 upgrades for PSAPs, state authorities insisted that carriers utilize a Feature Group D class of service with a wireless interface device for both CAS and NCAS signaling formats. While the state backed away from this position to some extent in April 1999, technical specifications for the system effectively continued to promote Feature Group D. While AirTouch is hopeful that these issues have now been resolved, the state, in effect, requested that carriers "jury-rig" their networks to accommodate PSAPs' outmoded equipment. AirTouch submits that this outcome was *not* what the Commission envisioned when it afforded "carriers and Government officials the freedom to develop innovative cost recovery solutions tailored to local conditions and needs."²⁵

A regulatory regime in which carriers are effectively required to implement different E-911 solutions on a county-by-county or state-by-state basis runs counter not only to the Commission's intent in promoting E-911 service, but to the realities of wireless network

²⁵ *E-911 Reconsideration Order*, 12 FCC Rcd. at 22734-35.

procurement and to effective, reliable deployment. The Commission should therefore clarify that PSAPs and state agencies may not impose E-911 transmission technologies on carriers.

C. The Commission Should Generally Leave its Phase I Rules Intact, with Some Important Specific Clarifications

Based on its Phase I deployment experience in numerous markets with different state and local cost recovery mechanisms, AirTouch generally believes that the Commission's E-911 rules are working, although more slowly than the Commission anticipated, in deploying Phase I service. There are certain steps that the Commission should -- and should not -- take to resolve issues that have arisen between carriers and state and local legislators and officials and to further facilitate Phase I deployment.²⁶

1. The Commission Should Not Eliminate the E911 Cost Recovery Requirement for Phase I

As indicated previously, the Commission should retain its existing E-911 cost recovery requirement. The original basis for the rule -- the anticipated costs of E-911 implementation -- remains valid today.²⁷ Carriers still have sizeable costs as well as a need to recover such costs. Moreover, the record of collaboration between carriers and state and local governments to date indicates that the cost recovery requirement is *not* an unreasonable obstacle to Phase I deployment. There is no basis in AirTouch's experience for concluding that the cost

²⁶ In addition to the accommodations set forth below, AirTouch agrees with the Report's conclusion that liability protection will help facilitate the deployment of Phase I service. AirTouch supports S.800, which has passed both houses of Congress, and may resolve this issue independently from Commission action.

²⁷ See *supra* note 7 and accompanying text.

recovery requirement only “hinders” Phase I deployment; ultimately, cost recovery facilitates the collaboration between carriers and PSAPs necessary to successfully deploy Phase I services.

Indeed, as NENA states, eliminating the current rule in favor of a “bill and keep” approach would eliminate important cooperative efforts between carriers and PSAPs.²⁸ In turn, this will *hinder*, not advance, the widespread deployment of Phase I service. As NENA explains:

[T]he introduction of this new approach will seriously jeopardize the successful arrangements that are currently in place to provide cost recovery Introducing a bill and keep scheme retroactively to these jurisdictions will likely create disputes regarding funds already collected, and place the wireless carrier and PSAPs in the position of reworking difficult agreements that are already in place.²⁹

Furthermore, the mere *perception* that the Commission is considering eliminating the cost recovery requirement may undermine parties’ incentives to negotiate cost recovery mechanisms and implement Phase I Solutions.³⁰ Thus, rather than focusing on what should be the task at hand, PSAPs and state legislatures may instead have “one eye” looking for the Commission to absolve them of this obligation. Advances made in Phase I deployment to date will be for naught, and PSAPs and state and local agencies will lose carriers as allies in their efforts to secure funding for necessary PSAP upgrades. This would seriously disserve public safety.

²⁸ See NENA Statement at 2.

²⁹ See *id.* at 2. NASNA also opposes modifying the current rules regarding cost recovery. See NASNA Statement at 1.

³⁰ See CTIA Statement at 1-2 (“Commission inquiry . . . risks freezing the ongoing efforts throughout the Nation which are focused on delivering Phase I capabilities to the public, and even risks undoing funding agreements that already have been successfully negotiated.”).

The Commission should also reject arguments made by state and local authorities in Washington, as described in the King County E911 Program comments, that cost recovery in that state should not include the costs of ANI.³¹ As King County explains, Washington state law “requires wireless carriers to provide ANI to the PSAPs at no cost.”³² Under the Commission’s rules, however, cost recovery is a prerequisite to providing ANI. The state requirement plainly conflicts with the Commission’s rules. The Commission has already concluded that “state actions that are incompatible with the policies and rules adopted in this [*First Report and Order*] are subject to preemption.”³³ The Washington state law is thus subject to preemption.

State and local government authorities in Washington argue essentially that because the state’s “E911 wireless excise tax was established at half the rate of the wireline tax rate, in exchange for the provision of ANI *at no cost*” the state has established a funding mechanism for ANI.³⁴ This argument is internally inconsistent, and contrary to the Washington statute itself. In fact, the E911 tax in Washington was designed for counties’ PSAP costs, not carrier cost recovery. Funding for E911 service in Washington has gone solely to PSAPs. Indeed, AirTouch, which is one of the two carriers cited in King County’s comments as currently providing ANI, has not recovered any of its ANI deployment costs for Washington. The counties’ arguments should be rejected.

³¹ King County Comments at 3.

³² *Id.* at 2.

³³ *E911 First Report and Order*, 11 FCC Rcd. at 18730 ¶ 104.

³⁴ King County Comments at 3 (emphasis added).

2. The Commission Should Clarify that Carriers -- not PSAPs -- May Choose Their Own Phase I Technology Solution and Vendor

As the Commission has acknowledged, and as AirTouch's experience in Minnesota illustrates, disputes over Phase I transmission technologies may hinder the resolution of cost recovery and technical issues and slow the deployment of Phase I service. The Commission has appropriately concluded that it is "reasonable that carriers may want to choose one technology for the transmission of their Phase I data in order to take into account a systemwide application in the interest of cost efficiency and effectiveness."³⁵ The Commission juxtaposes carriers' interests with the PSAP's need to "take into account its own individual system, which is made up of both wireline and wireless networks, and the public funds on which the system depends."³⁶

This concern, however, does not warrant authorizing PSAPs to impose technology choices on carriers. Through the industry standards process, and as field trials have demonstrated, concerns for PSAP interoperability have largely been addressed.³⁷ To the extent that legislators are unwilling to fund the PSAPs' and carriers' upgrades, the Commission's rules have appropriately left this issue to the discretion of state and local governments for ultimate resolution.

APCO, however, asserts that carriers "have little or no incentive to select the most cost-effective approach" and have gold-plating incentives "to avoid or delay compliance [by]

³⁵ June 9th Public Notice at 6.

³⁶ *Id.*

³⁷ *See* AT&T Comments at 3-4 (citing Los Angeles field trial).

propos[ing] a location technology with projected costs that far exceed the available cost-recovery funds” or, where a cost recovery mechanism involves creation of a common pool of revenues, “to maximize their costs . . . if only to deny any advantage to their competitors.”³⁸ In reality, carriers instead have the incentive to implement reliable, cost-effective and system-wide Phase I solutions -- a fact to which AirTouch’s experience attests. Further, to the extent that a PSAP or state agency believes that a carrier should not recover certain costs, it is AirTouch’s experience that these differences are generally resolved in the negotiation process when designing and administering a cost recovery mechanism. Moreover, PSAPs are able to evaluate the legitimacy of carrier reimbursement requests and can deal with any abuses presented.

In addition, the fact that several states have successfully adopted cost recovery mechanisms *without* attempting to impose a particular transmission technology on carriers also indicates that “gold-plating” is not a big problem. In fact, carriers have only a small number of vendors from which to choose their Phase I technologies and, for the efficiency reasons cited by the Commission, generally opt for a system-wide solution with one vendor. APCO has overstated the extent to which carriers “pick and choose” particular technologies for purpose of avoiding Phase I obligations. Again, carriers are instead seeking effective, reliable and economic Phase I solutions.

For these reasons, AirTouch agrees with AT&T that “[i]f individual PSAPs are allowed to force CMRS providers to conform to the PSAP’s technology choice, the result will be the ‘balkanization’ of wireless 911 systems, rather than the development of seamless national

³⁸ APCO Statement at 3.

system that the Commission has envisioned.”³⁹ The Commission should therefore confirm that CMRS carriers have the right to select their own E-911 technology.

3. The Commission Should Facilitate Collaboration by Addressing Antitrust and Confidentiality Concerns that Have Arisen Between Carriers and PSAPs

The Report appropriately notes that carriers “are limited in their ability to discuss and decide on matters affecting E9-1-1 implementation due to antitrust concerns.”⁴⁰ AirTouch agrees that to the extent that the Commission has authority to address these concerns “by virtue of its exclusive jurisdiction over mobile service spectrum management ‘to promote the safety of life and property,’” it should do so.⁴¹

The Commission also should clarify that “reasonable and lawful” cost recovery mechanisms do not require the public disclosure of proprietary cost and technical data. The Commission has previously clarified that E911 funding mechanisms “should recognize E911 costs in a reasonable and lawful way” and should overall “be reasonable and lawful.”⁴² A cost recovery mechanism or process that requires the disclosure of an individual’s carrier’s proprietary information to other carriers is not reasonable. The Commission should clarify that a government entity charged with E-911 implementation may not require disclosure of an individual carrier’s proprietary information unless that entity has adopted procedures or

³⁹ AT&T Comments at 5.

⁴⁰ Report at 14-15.

⁴¹ *See id.*

⁴² *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Declaratory Ruling*, CC Docket No. 94-102, DA 98-2572, ¶¶ 23-24 (Wireless Telecom. Bur. rel. Dec. 18, 1998).

protective agreements to ensure that such information is not disclosed to other carriers or the public.⁴³

Such clarification would expedite Phase I negotiations by facilitating nondisclosure agreements between carriers and state and local government entities. Indeed, AirTouch's experience is that where states and localities enter into nondisclosure agreements with carriers, the parties are better able to negotiate cost recovery mechanisms and resolve technical/administrative issues.⁴⁴

⁴³ See *Numbering Resource Optimization, Notice of Proposed Rulemaking*, CC Docket No. 99-200, FCC 99-122 (rel. June 2, 1999) (NANC recommendation "that states may obtain carrier-specific [utilization] data only in states where a legally enforceable confidentiality agreement is in place"); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition, Third Order on Reconsideration*, 9 FCC Rcd 4316, ¶ 78 n.42 (1994).

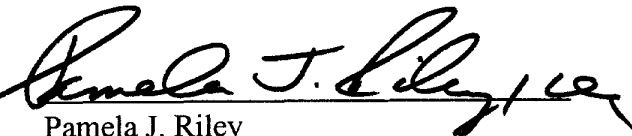
⁴⁴ In this regard, King County asserts that carriers' "inability and/or unwillingness . . . to share actual cost data for providing Phase I service" is a "major factor which has caused delays" in implementing a cost recovery mechanism. King County Comments at 3-4. AirTouch, which provides cellular service in King County, has had constructive negotiations with King County regarding Phase I deployment and has provided cost data -- notwithstanding the difficulties the parties have had in implementing a statewide funding mechanism. AirTouch also acknowledges the County's efforts in advocating a comprehensive E-911 cost recovery mechanism at the state level. Nevertheless, AirTouch notes that legislative efforts were also unsuccessful because of some *counties'* concern for their share of E-911 funding.

CONCLUSION

For the foregoing reasons, the Commission should reaffirm the current E-911 cost recovery rules and make the clarifications discussed above regarding carriers' technology choices, antitrust issues, and treatment of proprietary data.

Respectfully submitted,

AIRTOUCH COMMUNICATIONS, INC.

By: 

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(202) 783-4141

Its Attorneys

September 14, 1999

AIRTOUCH COMMUNICATIONS, INC.

E911 PHASE I - SERVICE ORDER FORM

Order No. _____

CARRIER

Carrier Notification
AirTouch Cellular, Inc.
3350 161st Ave. SE
Bellevue, WA 98009
Attention: Legal Department

Carrier Contact -- 24x7x365
Name: XYPOINT Corporation
Telephone Number: 1-800-959-3749
Fax Number: 206-674-1080

Monthly Rate: \$ _____ per Carrier subscriber in PSAP Service Jurisdiction
 XYBox: \$ _____
 monthly data fee: \$ _____

Payment terms on Invoice

Monthly payment begins on Deployment Date of: _____

CUSTOMER

Ordered by: _____
 Type of Entity: _____
 (i.e., PSAP Jurisdiction, Governmental Agency)

Address: _____

City: _____

State: _____ Zip code: _____

PSAP Service Jurisdictions:

FIPS:

Customer Contact -- 24x7x365
Name: _____
Telephone Number: _____
Fax Number: _____

Customer Billing address:

Customer Notification

Attention: _____

The parties will use their best efforts to meet testing and implementation schedule developed upon mutual agreement.

Customer's Representations and Warranties:

Customer is legally authorized to subscribe to enhanced 911 service, to enter into this Service Agreement and agrees to its terms and conditions.

Agreed and Accepted:

Customer name

Signed:

By:

(print name)

Title:

Date:

Service Description: Carrier shall provide E911 Phase I Service ("Service") to and for the sole benefit of Customer, in compliance with Phase I of the FCC Order in Docket 94-102, but only in such portions of PSAP Service Jurisdictions, identified on this Form, that Carrier operates its wireless service. Such Service shall be provided pursuant to Functional Specifications set forth in the Carrier's, or its subcontractor's, procedures. A copy of Functional Specifications will be provided to Customer as part of the testing and implementation process.

Responsibilities of Customer: Customer shall:

1. Have sole responsibility to answer, respond to, transfer, terminate or otherwise handle E911 telephone calls, to dispatch or arrange to dispatch emergency services.
2. Furnish Carrier, at Customer's expense, all technical matter, data and information as determined by Carrier to be necessary under this Agreement.
3. Provide access to Customer's premises, as needed by Carrier or its subcontractors.
4. Pay Carrier for its costs to provide Service to Customer.

Mutual Obligations: The parties agree to keep confidential and not use or disclose any confidential information provided under this Agreement, including but not limited to customer counts, maps, cell sites, network configuration etc.

Arbitration: In the event a dispute between the parties arises out of this Agreement, the parties shall meet and negotiate in good faith to attempt to resolve such dispute. In the event such dispute is not resolved within thirty (30) calendar days of a written notice, the dispute shall be resolved by mandatory arbitration in accordance with the AAA arbitration rules and procedures, except to the extent such rules and procedures are amended or conflict with the provisions of this Agreement. The cost of arbitration, including the fees and expenses of the arbitrator, shall be shared equally by the parties unless the arbitration award provides otherwise. Each party shall bear the cost of preparing and presenting its case. The parties agree that this provision and the arbitrator's authority to grant relief, shall be subject to the Federal Arbitration Act, 9 USC 1-16 et seq ("USAA"), the provisions of this Agreement and the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes. The parties agree that the arbitrator shall have no power or authority to make awards or issue order of any kind, except as expressly permitted by this Agreement, and in no event shall the arbitrator have the authority to make an award that provides for punitive or exemplary damages. The arbitrator's decisions shall follow the plain meaning of the relevant documents, and shall be final and binding. The award may be confirmed and enforced in any court of competent jurisdiction. All post-award proceedings shall be governed by the USAA.

Term: This Agreement is effective on the date of Customer's signature to this Form ("Effective Date") and shall remain in effect for three (3) years beginning on the Effective Date ("Initial Term"). This Agreement shall automatically renew for successive one (1) year terms ("Subsequent Term") unless written notice of termination is given to the other party not less than one hundred twenty (120) days prior to the expiration of each Subsequent Term. This Agreement may be superseded in the event the parties enter into a Phase I E 9-1-1 Agreement or an agreement for new or upgraded services.

Limitation of Liability and Indemnification:

1. **Limitation of Liability.** In addition to release, indemnification and hold harmless provisions, and any other limitations of liability set forth elsewhere in this Agreement, and not by way of limiting or otherwise affecting the validity or enforcement of such provisions, the parties agree that Carrier's and its subcontractor's liability under this Agreement is limited as set forth below:

a. **Liability Limited by Law.** Carrier and its subcontractors are providing Service pursuant to all limitations of liability that may be provided under applicable law.

b. **Facilities and Equipment.** Carrier and its subcontractors shall have no liability to Customer in the event changes in any of Carrier's or subcontractors' facilities, operations, equipment, procedures, or Service render obsolete any equipment or software used by Customer in conjunction with the use of Service; require modification or alteration of such equipment or software; or otherwise affect the performance of such equipment or software.

c. **Additional Limitations.** In addition to limitations of liability provided by applicable law, the parties agree that Carrier and its subcontractors shall not be liable for any damages in a civil action for death or injury to persons, or damage to property resulting from an act of omission of Carrier or any subcontractor, or from the installation, operation, maintenance, removal, presence, condition, or use of all or any portion of Service, or from any errors, interruptions, defects, failures or malfunctions of Service or any part thereof, unless the act or omission causing death, injury or damages constitutes willful or wanton misconduct by Carrier or its subcontractor in connection with developing, adopting, implementing, maintaining, or operating the Service.

d. **No Third-Party Beneficiary Relationship or Liability Created.** Carrier offers Service to Customer solely as an aid in Customer's provision of E911 Service. Carrier's provision of Service and facilities to Customer does not

create any relationship or obligation, direct or indirect to any person or entity other than Customer.

2. **General Indemnity.** To the extent allowed by law, the Customer will release, indemnify and hold harmless Carrier and its subcontractors (including their respective directors, officers, employees, and agents) from and against any and all claims, actions, losses, harm, costs, damages, liabilities, infringements, illegalities, and expenses (including, without limitation reasonable attorneys' fees), whether known or unknown, existing or arising in the future, relating to or arising out of the delivery and provision of the E911 Service described in this Agreement, and for all acts or omissions associated with this Agreement or associated with handling any of E911 calls, and for any performance or non-performance of any obligation under this Agreement. Such release and indemnification applies fully and without exception to any and all of the following types of claims or actions: tort, breach of contract, injuries, death or loss to person or property; trespass; misuse of proprietary or confidential information; invasion of privacy or other violation of any privacy rights; violations of constitutional rights; antitrust; defacement of, or damage to, each other's premises, except to the extent such claims or actions arise out of grossly negligent, willful or wanton acts or omissions.

DISCLAIMER OF WARRANTIES EXCEPT MANUFACTURERS' WARRANTIES: THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT IS A CONTRACT FOR THE PROVISION OF SERVICES AND THAT ANY GOODS PROVIDED HEREUNDER ARE ANCILLARY TO THE PROVISION OF THE REQUESTED SERVICES. WITH THE SOLE EXCEPTION OF ANY EXPRESS WRITTEN MANUFACTURER'S WARRANTY, WHICH MAY BE APPLICABLE TO PARTICULAR GOODS, ALL GOODS ARE PROVIDED "AS IS". THE PARTIES AGREE THAT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ARE EXCLUDED FROM THIS TRANSACTION AND SHALL NOT APPLY TO ANY GOODS OR SERVICES PROVIDED. CARRIER AND ITS SUBCONTRACTORS EXPRESSLY EXCLUDE AND DISCLAIM ANY AND ALL WARRANTIES, GUARANTEES OR REPRESENTATIONS WHATSOEVER, EXPRESS OR IMPLIED, ORAL, WRITTEN OR OTHERWISE, RELATED TO ANY EQUIPMENT, FACILITIES, FEATURES, REPAIR, MAINTENANCE, AND ANY AND ALL GOODS AND SERVICES PROVIDED OR TO BE PROVIDED TO CUSTOMER BY CARRIER OR ITS SUBCONTRACTORS. THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF.

Independent Contractor. Carrier's relationship with Customer under this Agreement is that of an independent contractor.

Interruptions of Service: Carrier's and its subcontractor's total liability for damages to Customer for service interruptions to Customer shall be limited to a refund of charges paid for the period of service interruption. In no event shall Carrier's or its subcontractor's liability to Customer, resulting from this Agreement, exceed the amount paid by Customer. Carrier and its subcontractors shall not be liable for special, indirect or consequential damages arising out of or in connection with the Service provided under this Agreement.

Delay/Force Majeure. Carrier shall exercise reasonable efforts in performing services pursuant to this Agreement, but Carrier shall not be liable for any delays resulting from circumstances beyond its control, including acts of third parties and acts of God.

Assignment. The Parties to this Agreement may not assign any of their rights nor delegate any of their obligations under this Agreement without the prior written consent of the other Party (which consent shall not be reasonably withheld), except that Carrier may assign its rights or delegate its duties under this Agreement to any of its affiliates, to the surviving entity in a merger or consolidation or to a purchaser of substantially all of the assets of the business to which this Agreement relates without Customer's written consent. All the terms and provisions of this Agreement will be binding upon and inure to the benefit of and be enforceable by the Parties and their respective permitted successors/assigns.

Amendment/Modification. Any term of this Agreement may be amended and the observance of any terms may be waived only with the written consent of the parties. Carrier may modify this Agreement upon sixty (60) days written notice to Customer, if there is a change in an applicable law or if Carrier should sell or otherwise dispose of all or part of its wireless communications service license for the provision of wireless communication service in any portion of the PSAP Service Jurisdictions. Upon such event, this Agreement may be modified only as appropriate to reflect such disposition. This shall include removal of the relevant area from this Agreement.

Entire Agreement. Notwithstanding any amendments/modifications hereto, this constitutes the entire Agreement.